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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 163

J. KENNETH EDLIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The petitioner, J. Kenneth Edlin, files this brief in response to certain contentions advanced by the United States in its Brief in Opposition to the Petition.

A. The Constitutional Issue

In light of the Government's misunderstanding (Opp. Br. 6-8) of petitioner's claim as to the effect of the Speech or Debate Clause, it is appropriate to restate that claim. Petitioner has no quarrel with the concept of that Clause as one prohibiting only inquiries into Congressional speeches and debates and as one proscribing punishment of members of Congress out-

side the legislative chambers. Nor can there be any dispute with the idea that the purpose of the Clause is to keep legislative debate and speech free from executive or judicial limitation so as to maintain the separateness of the three branches of government. See Opp. Br. 6-7.

The question that petitioner does raise, however, and it is one to which the Government makes no answer, is whether the Speech or Debate Clause permits a violation thereof in order to convict a non-Congressional co-defendant in a conspiracy case. This Court's decision in *United States* v. *Johnson,* 383 U.S. 169, has conclusively established that the Clause was violated, in the course of prosecuting the co-defendant Congressman Johnson, by the extensive inquiry made into the content and motives of the speech he made on the floor of the House. The problem in this case is whether precisely that same inquiry into Johnson's speech and motives can be used to secure the conviction of a conspiracy co-defendant who is not a Congressman.

That problem is not one, as the Government would have it (Opp. Br. 7), of extending the constitutional privilege to private parties like the petitioner. Rather the issue is whether the privilege as to the Congressman can be violated in order to create evidence to convict a private party along with the Congressman himself. So stating the issue, it becomes obvious that the petitioner is not claiming for himself any constitutional immunity from prosecution and punishment. He is merely saying that his conviction cannot be premised upon constitutionally tainted evidence resulting from an invasion of the Congressman's immunity. And once

that invasion has been made evident, as was done in the *Johnson* decision, it matters not whether the particular defendant whose conviction rests on that invasion be a Congressman or a non-Congressman. In that event the constitutional principle proscribing judicial inquiries into the Congressman's speech and motivation demands exclusion of any and all evidence reflected by such inquiries even where the defendant is a non-Congressman. Otherwise the Speech or Debate Clause could easily be circumvented by the device of making the proscribed inquiry and using the proscribed evidence only with respect to a non-Congressional defendant. Such a subterfuge is obviously inconsistent with the high purposes and principles of the Clause in question.

The suggestion of the Government (Opp. Br. 8) that the Speech or Debate Clause protection was meant to be effective "only where the Constitution affords some remedy within the legislative branch" does not meet the problem of this case. Of course the privilege afforded by that Clause is personal to the Congressman. Of course the Clause gives that privilege on condition that the Congress retains power to "punish its Members." But a violation of that privilege is nonetheless offensive where the invasion occurs in the context of the trial of one who happens to be a non-Congressional co-defendant. And to conclude that such a co-defendant may not be convicted by resort to evidence stemming from such an invasion is not to immunize him from all punishment. Certainly the exclusion of constitutionally proscribed evidence from this defendant's trial does not immunize him from any prosecution premised on constitutionally permissible proof.

In short, let the Government proceed against petitioner for any violation of law it may validly charge. But let not the Government prove that charge by resort to evidence secured by an invasion of a Congressman's personal privilege against judicial inquiry into his speech and motivations therefor. That is the sum and substance of the important and as yet unanswered problem in this case. It is that problem that assuredly merits the attention of this Court.

Indeed, to permit the questioning of a Congressman in the course of prosecuting his wife, his aide, his constituent, or his friend is to compound the very evil that the Clause was designed to outlaw. For surely the inhibition on fearless Congressional debate is as great if not greater where the Congressman knows that his motives can be questioned in order to secure the conviction of an individual in some way associated with him.

B. The Aiding and Abetting Convictions

The response of the Government to the question whether the petitioner can be convicted of aiding and abetting the receipt of money by Congressman Johnson where Johnson's conviction as a principal has been set aside is two-fold: (1) since petitioner is "not entitled to have evidence pertaining to the speech excluded," his conviction on the substantive counts is untainted by any impermissible proof; (2) the reversal of the aiding and abetting convictions in *Shuttlesworth* v. *Birmingham*, 373 U.S. 262, is distinguishable since the conduct in that case which the defendant's allegedly aided and abetted was "an innocent act" and "not a crime at all." Opp. Br. 9. Neither proposition answers the issue posed by petitioner or detracts from the appropriateness of granting certiorari.

Indeed, the Government's claim that petitioner's convictions as aider and abettor are proper since he was not entitled to have the evidence as to the speech excluded only augments the importance and need for review of the constitutional question in this case. If petitioner is right with respect to the impact of the Speech or Debate Clause on the use of the speech evidence to secure petitioner's conviction under the conspiracy count, then the Government's claim impliedly concedes that such impermissible proof may have tainted petitioner's convictions under the substantive counts—as was held to be true with respect to Johnson. The constitutional question thus truly impregnates this whole case.

Moreover, whether the conduct to which the charge of aiding and abetting is related be deemed "an innocent act" or a crime as yet unproved would appear irrelevant in assessing the legal propriety of petitioner's convictions under the aiding and abetting counts. This is a case where the critical conduct—that of *receiving* compensation in violation of 18 U.S.C. § 281—could only have been engaged in by Johnson. Petitioner himself could not have committed that offense; hence he cannot be viewed as a principal under the aiding and abetting charges. See *United States* v. *Tornabene,* 222 F. 2d 875, 877-878 (C.A. 3). In this situation the proven guilt of the principal, Johnson, is absolutely essential to any affirmance of the aiding and abetting convictions. *Ibid.* In fact, the jury was so charged in this very case. It was instructed that "unless the Government has proved beyond a reasonable doubt that defendant Johnson received compensation as charged . . . [in counts 2 through 8] for services rendered and to be rendered before the Depart-

ment of Justice, all defendants must be acquitted on said counts." Tr. 6300.

Thus the critical element is not whether Johnson's actions were "not a crime at all" but whether his guilt *as principal* has been validly demonstrated. That element, in light of the action vacating his conviction and remanding for a new trial, is fatally absent here. "No matter how strong the evidence" may have been as to Johnson's guilt at the first trial, in the words of *United Brotherhood* v. *United States*, 330 U.S. 395, 408, there "is no way of knowing whether the jury's verdict was based on" or influenced by the constitutionally proscribed evidence. Hence Johnson's guilt as principal has yet to be properly established; and until that is done, there can be no aiding and abetting conviction. The apparent confusion of the Government respecting this basic nature of aiding and abetting convictions in federal jurisprudence underscores the need for elucidation by this Court.

C. The Prejudicial Testimony

The importance of the question concerning the cumulative impact of the prejudicial testimony concerning petitioner Edlin's character and past record has in no way been diminished by the Government. The alleged relevance of such testimony in terms of the discussions of such matters at the Department of Justice conferences (Opp. Br. 13-14) cannot overcome the *Michelson* principle, 335 U.S. 469, 475-476, closing the door on such testimony despite its asserted relevance.

Nor can the Government's claim that the trial court "repeatedly admonished the jury not to consider such testimony as showing a propensity or predisposition

to commit the crime for which Edlin was being tried" (Opp. Br. 14) serve to validate the introduction of prejudicial testimony. To begin with, the so-called "admonitions" cited by the Government were scarcely responsive, either in quantity or quality, to the countless instances of prejudicial testimony. Apart from summarily denying repeated motions for mistrial, the judge did little more than instruct the jury two or three times not to consider certain prejudicial testimony "as evidence against Mr. Edlin in this case" (Tr. 1684, 1743)—thereby leaving the prejudicial matters before the jury presumably for consideration with respect to the co-defendants. As was said in *Awkard* v. *United States,* 352 F. 2d 641, 646 (App. D.C.), such a cautionary instruction "cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another." See also *Pinkney* v. *United States,* F. 2d (App. D.C., No. 19,925, July 8, 1966); *Gregory* v. *United States,* F. 2d (App. D.C., No. 19,599, July 28, 1966). Cf. *Jackson* v. *Denno,* 378 U.S. 368, 388.

On only one occasion did the judge tell the jury that certain testimony concerning petitioner's criminal record was "not to be held against him and not to be considered by the jury . . . unless and until the Court instructs the jury otherwise," his character not being "in issue in this case." Tr. 1819. But even in that instance the prejudicial testimony was not stricken; it was held to be "relevant and material in so far as it may support one of the alleged overt acts." Tr. 1819. And there was a general remark in the final

instructions that the defendants were not on trial "for any act or conduct not charged in the indictment." Tr. 6263.

The foregoing "admonitions" are presumably the strongest or the best that the Government could find. Quite obviously, apart from their own inadequacy, they were insufficient to overcome the repeated instances where no admonition whatever was given upon the introduction of prejudicial testimony. Time and again the jury was allowed without qualification to hear remarks about petitioner's past criminal record and his reputed character. Illustrative of the prejudicial atmosphere which surrounded petitioner's trial was the court's own questioning of a witness to develop the facts concerning petitioner's plea and sentence in a prior criminal proceeding (Tr. 1219-1220) and the freedom accorded other questions concerning petitioner's unrelated indictment then pending in Montgomery County, Md. (Tr. 1529-1530). It was the accumulation of such prejudicial testimony that made the trial so unfair.

Even if the sparse admonitions be considered prompt or sufficient on their face, the caveat of *Pierce* v. *United States*, 56 F. 2d 949, 952-953 (C.A. 5), remains relevant:

> "To those with any breadth of experience in the trial of criminal cases it must be clear that suggestions, especially when often repeated, that a defendant has earlier been in trouble with the law, that he has elsewhere or previously been indicted, (and like matters) are so prejudicial that no admonitions from the court that they be disregarded, however promptly and forcibly made, may be safely relied upon to free the minds of the jurors from the impression that the defendant is of bad

character and capable of committing the crime charged. They may completely overthrow the presumption of innocence . . . ."

As was said by Mr. Justice Jackson, concurring in *Krulewitch* v. *United States,* 336 U.S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

That observation has great force in this case, where the repetition and totality of the prejudicial testimony were so great. Prejudice accumulated is atmosphere infected. And a conviction obtained in such an atmosphere cannot stand. See *United States* v. *Tomaiolo,* 249 F. 2d 683, 689-697 (C.A. 2).

Preservation of the fair administration of federal criminal justice necessitates thorough review by this Court of the prejudicial atmosphere surrounding petitioner's trial.

CONCLUSIOIN

For these reasons, supplementing those in the Petition, certiorari should issue to review the decision and judgment below respecting this petitioner.

Respectfully submitted,

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